SUPREME COURT OF APPEALS OF VIRGINIA.

VIRGINIA IRON, COAL & COKE CO. v. TOMLINSON.

June 28, 1905.

[51 S. E. 362.]

1. EXPERT EVIDENCE — *Matters of common knowledge.*—Upon the question as to whether it was dangerous for a boy twelve years old to attempt to start a belt operating machinery by swinging over a sill above the belt by his hands, and tramping upon the belt with his feet, the jurors were as competent to form an opinion as the witnesses, and hence expert testimony that such method of starting the belt was dangerous was inadmissible.
2. EXPERT WITNESSES—*Competency.*—The decision of the trial court as to the qualification of an expert witness will not be reviewed unless it clearly appears that the witness was not qualified.
3. MASTER AND SERVANT — *Failure to warn infant servant — Evidence.*— —In an action for the death of an infant servant injured while working about certain machinery, evidence that children were permitted by defendant to go about the place where deceased was killed was admissible; but evidence that children were permitted to go in other dangerous places was not competent to show that defendant had failed to instruct children as to the dangers attending their employment, or had given general permission for them to go into dangerous places.
4. SAME.—In an action for the death of an infant servant, in which it was charged that the master had not given warning of danger, evidence by other employés that they had never heard the foreman give any instruction to any one as to the danger was not admissible.
5. SAME—*Contributory negligence.*—In an action for the death of a servant less than twelve years of age, an instruction that if deceased, without being ordered to do so, left the place at which he was assigned to work, and went in proximity to the cogwheels where it was alleged he was injured for any purpose not connected with the performance of his duty, defendant was not liable, was properly refused; it being presumed that deceased was not guilty of contributory negligence.
6. SAME — *Contributory negligence of parent — Consent to employment.*—Where the death of an infant was caused by the negligence of his employer, the fact that the infant's father consented to the employment did not defeat his right to recover.
7. SAME—*Precise cause of injury — Necessity of proof.*—Where, in an action for the death of an infant, there was direct evidence tending to show that the defendant was negligent in failing to properly warn decedent of the danger, and in requiring him to perform dangerous work not within the scope of his employment, it was proper to instruct that plaintiff might recover, if the jury believed that the death was caused by defendant's negligence, although plaintiff had not proven the exact way in which deceased was killed.

8. SAME—*Pleading.*—Where, in an action for the death of a servant, the declaration alleged that defendant negligently employed deceased in a dangerous place and in a dangerous occupation, in that it required him to start certain machinery when it stopped, in discharging which duty deceased necessarily came into proximity with the cogwheels which caused his death, plaintiff was entitled to prove that the work of starting the machinery was beyond the scope of decedent's employment.
9. SAME—*Evidence—Question for jury.*—In an action for the death of a servant killed by being caught in the cogwheels in a buddle, evidence *held* sufficient to justify submission to the jury of the issue of defendant's negligence.
10. SAME — *Amount of care required.* — A master is required to exercise only ordinary care for the safety of his servants, although the amount of care necessary to constitute ordinary care may vary with circumstances, and it is error to instruct that the law requires of a master the highest degree of responsibility for the care and protection of an infant employé.

[Ed. Note.—For cases in point, see Vol. 34, Cent. Dig. Master and Servant, secs. 139, 141.]

Appeal from Circuit Court, Wythe County.

Action by the administrator of Vivian P. Tomlinson, against the Virginia Iron, Coal & Coke Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

P. H. C. Cabell and *Fulton & Fulton,* for appellant.

A. A. Campbell and *Robt. Sayers, Jr.,* for appellee.

BUCHANAN, J.

Vivian P. Tomlinson, an infant aged 11 years and 6 months, lost his life whilst in the service of the Virginia Iron, Coal & Coke Company, and this action was instituted by his personal representative (his father) to recover damages on the ground that his decedent's death was caused by the negligence of the defendant company.

Upon a trial of the cause there was a verdict and judgment against the defendant company, and to that judgment this writ of error was awarded.

It appears that the defendant company was the owner and operator of machinery called a "buddle," used for the purpose of separating iron ore from the dirt and other impurities found with it. The buddle is located on the side of a hill, and is a structure in which there are three stories or levels. The ore is brought on small cars from the mine to the upper story or level of the buddle,

where it is dumped into washers. The washers consist of logs with paddles attached, incased in closed boxes into which water flows. The logs are made to revolve by means of a gearing consisting of pinions, cogwheels, and belts driven by a steam engine. The paddles upon the revolving logs keep the ore pushed toward one end of the washer, and the mud and water pass out at the other end.

The washers are covered over, and their covering makes, or aids in making, the second level of the buddle. From the washers the ore passes into a screen through which water also passes, and from the screen the ore is carried through a chute into cars underneath the first or ground level. Steps lead from one level of the buddle to another.

The plaintiff's intestate was employed, with the consent of his father, to work at the chute on the bottom floor or level; his duty being to pick mud balls and other substances from the iron ore as it passed through the chute. Near the decedent's place of work was the gearing of the sand washer, with its cogwheels, pinions, pulleys, and belt, but not sufficiently close to endanger his safety whilst engaged in the work he was employed to do. He had been at work at this place for about six weeks prior to his death, which occurred on the 10th day of December, 1903, a few days before the wise and humane statute went into effect which makes it a misdemeanor to employ children under 14 years of age in such work. Va. Code 1904, sec. 3657bb.

On that day, a few minutes before the buddle was stopped for the employés to get their dinner, he was found crushed to death between the cogwheels (one of which is 34 inches in diameter) of the sand washer. There is no direct evidence as to the manner in which he came in contact with the cogwheels and lost his life.

One of the theories of the plaintiff as to the manner in which the accident occured, and the one principally insisted upon, is that the belt on the sand washer was slipping, as it sometimes did, and that the decedent, who had been directed by the foreman of the buddle to start the belt when it stopped, was attempting to start it by catching hold of the sill to which the roof was fastened, swinging over and tramping upon the belt with his feet, and that while engaged in this effort to start the belt he fell or was thrown between the cogs below, and very near where he was killed, and that

such mode of starting the belt was not only dangerous, but beyond the scope of the decedent's duty, and that the decedent was not warned of the danger.

To show that such a method of starting the belt was dangerous, several witnesses were permitted to give opinion evidence to that effect over the defendant company's objection. This action of the court is assigned as error.

The facts disclosed by the record show that such a mode of starting the belt, especially by a child 11½ years of age, was manifestly dangerous. At least, the facts were of such character that jurors and men of ordinary intelligence generally would be just as competent to form an opinion and determine whether or not that mode of starting the belt was dangerous as the witnesses. This being so, opinion or expert evidence was not admissible. Such evidence, as a rule, is not admissible where the facts already before the jury, or which may be sufficiently brought before it, furnish all the materials necessary for its judgment. *Southern Ry. Co.* v. *Mauzy,* 98 Va. 692, 37 S. E. 285; 1 Wigmore on Ev. sec. 557. But while the evidence under consideration was not admissible, it was harmless error. *Lane Bros.* v. *Bauserman,* 103 Va. ——, 48 S. E. 857.

The trial court, over the defendant company's objection, permitted the plaintiff to testify that, when the buddle is overloaded and the belt is properly laced, the belt will not stop, but the overloading will either break the belt or some other part of the machinery. One objection made to this evidence was that it was not shown that the witness was an expert.

The qualification of a witness to testify as an expert being largely in the discretion of the trial court, its admission of such testimony will not be reviewed unless it clearly appears (as it does not in this case) that the witness was not qualified. *Lane Bros.* v. *Bauserman, supra; Richmond Locomotive Wks.* v. *Ford,* 94 Va. 627, 27 S. E. 509.

The other objection was that, even if the witness were an expert, the questions asked called for his opinion upon a hypothetical condition of facts which were not proved in the case.

There was evidence tending to prove the facts hypothetically stated, and the questions were not, therefore, objectionable on that ground.

The court permitted the plaintiff to prove that boys working about the buddle rode back and forth on the cars upon which the ore was hauled from the mine, with the knowledge of, and without objection by, the defendant company. This evidence was objected to by the defendant company because, even if riding on the cars was dangerous, and it were negligent in permitting it, there was no such charge of negligence in the declaration, and the evidence did not in the remotest degree have any connection with the decedent's death. The object of this evidence was to show that the defendant company had failed to instruct such children as to the dangers attending their employment, and general permission and custom for them to go into dangerous places about its works.

Evidence that children were permitted by the defendant company to go, or that they went with its knowledge and without objection, into or about the place where the deceased lost his life, was, in our opinion, admissible; but evidence that it had permitted other children to ride upon its cars which brought ore from the mine, or to go in or near other dangerous places upon the top of the buddle, in order to establish the negligence charged in the declaration, was not admissible. Wharton on Ev. sec. 40.

Employés of the defendant company were permitted to testify that they had never heard the foreman, Vaughan, or any other boss of the defendant company, give any instruction to boys working where decedent worked as to the dangers of the machinery where he was killed, and that they were in a position where they would have been likely to have heard any such instruction, if given. This action of the court is assigned as error.

While it was the duty of the defendant company to instruct the decedent and the boys working with him as to the dangers of the machinery by which they were surrounded, yet such instructions were not required to be given at any particular time and place. That being the case, the fact that the witnesses whose evidence is under consideration did not hear such instructions given does not tend to prove with any degree of probability that no such instructions were given. The evidence was therefore inadmissible.

The defendant company asked for 20 instructions. Of these, the court gave 14 as offered, modified instructions numbered 2, 4, 10, and 13, and gave them as amended, and refused to give instructions Nos. 15 and 20. The action of the court in modifying and refusing the instructions mentioned is assigned as error.

We do not think that the court erred in making the additions it did to instructions numbered 2, 4, 10, and 13; nor did it err to the prejudice of the defendant company in giving them as amended.

Instruction No. 15 told the jury that if they believed from the evidence that the plaintiff's intestate, without any requirement from the defendant company, left the place at which he was assigned to work, and went in such close proximity to the cogwheels, either for the purpose of getting grease from the post or cogs, or for any other purpose unconnected with the performance of his duty, then the defendant company was not responsible for the decedent's act in voluntarily exposing himself to such danger, and the jury should find for the defendant.

This instruction states a correct proposition of law as applied to an adult, but, without qualification, is an erroneous statement of the law as applied to an infant under 14 years of age, as to whom there is a *prima facie* presumption that he cannot be guilty of contributory negligence. *Lynchburg etc. Mills* v. *Stanley,* 102 Va. 590, 46 S. E. 908. See 1 Shear. & Red. on Neg. sec. 73a; 1 Labatt on Neg., sec. 348. The court therefore properly refused to give that instruction.

Instruction No. 20 told the jury that, if they believed from the evidence that the plaintiff contributed to the death of his son, he could not recover. There is no evidence tending to prove that the father in any wise proximately contributed to the death of his son. It is true that he consented that his son might enter the employment of the defendant company, but, if that company by its negligence caused the son's death, it clearly cannot defeat the father's right to recover therefor by showing that he consented to the employment. The court was plainly right in refusing to give that instruction.

The court gave six instructions for the plaintiff. The giving of each of these instructions, except No. 5, is assigned as error.

The first instruction is as follows: "The court instructs the jury that it is not necessary for the plaintiff to prove the exact way in which Vivian P. Tomlinson met his death, if they believe that he was killed; but if they believe that the plaintiff has shown by evidence, either direct, or by facts and circumstances, that Vivian P. Tomlinson was killed, and that his death was caused by the negligence of the Virginia Iron, Coal & Coke Company, as set forth

in any of the several counts of the declaration, though they are not certain in which way he was killed, they must find for the plaintiff."

The objections made to that instruction are that it is contrary to the well-established principle that the plaintiff must establish the fact that the proximate cause of the decedent's death was the negligence of the defendant, and this he must do by affirmative evidence, and that the evidence did not warrant its being given.

There is direct evidence tending to show that the defendant company was guilty of negligence in failing to properly warn the decedent of the dangers which surrounded him, and in requiring him to perform dangerous work not within the scope of his employment; and, while there is no direct evidence as to the manner in which he came to his death, there is evidence tending to show that it probably resulted from one or the other acts of negligence of which the evidence tended to show the defendant company was guilty. While the plaintiff must introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident. 2 Labatt on Neg. secs. 835, 836; 1 Shear. & Red. on Neg. sec. 58.

Instruction No. 2 given for the plaintiff is as follows: "The court instructs the jury that if they believe from the evidence that Vivian P. Tomlinson was an infant under fourteen years of age, and that he was employed by the Virginia Iron, Coal & Coke Company, and was required or permitted to start the machinery by pulling or tramping the belt, and was not instructed as to his danger, as set out in instruction No. —; and if they further believe that this was outside the regular duty for which he was employed, and not within the compass of his age and experience, and was an hazardous employment, involving greater danger than the work for which he was originally employed, for an infant of his age and capacity, and that he was caught by the machinery as charged, and killed in so doing—then they are instructed that said infant did not assume the risk of the same, and they must find for the plaintiff."

The objection made to this instruction is that there was no allegation in the declaration that the decedent was put to work outside of the scope of his employment, and that there was no evidence upon which to base it.

There is evidence tending to prove that the decedent was directed to start the belt when it slipped, and that one of the ways of starting it was more dangerous than the work he was employed to do. The second count of the declaration, after setting out the dangerous character of the place where the decedent was employed to work, alleges, among other things, that the defendant company negligently and wrongfully employed the decedent in a dangerous place and in a dangerous occupation for an infant under 14 years of age, in this: that it required him to start said machinery when it stopped by starting a belt connected with the machinery, and in discharging that duty the decedent necessarily came into close and dangerous proximity to the revolving cogwheels which caused his death. Under the allegations of that count, we think the plaintiff had the right to show that such work was beyond the scope of the decedent's employment, in order to prove the negligence charged, and to have the jury instructed upon that subject.

The plaintiff's instruction No. 3, which is upon the question of contributory negligence, is objected to because the evidence fails to show that the proximate cause of the decedent's death was the negligence of the defendant company.

There was, as before stated, direct evidence tending to show that the defendant company was guilty of negligence, and the circumstantial evidence tended to show that such negligence was the proximate cause of the decedent's death.

The same evidence justified the court in giving instruction No. 4 over the defendant's objection that there was no evidence upon which to base it.

The objection made to the sixth instruction is that it imposed a higher degree of care upon the defendant company for the protection of the decedent than is imposed by law. That instruction told the jury that the law required of the master the highest degree of responsibility for the care and protection of an infant employé.

The settled law of this state, by a long line of decisions, is that it is the duty of the master to exercise ordinary care for the safety of his servant in the course of his employment, but he is not bound to use any higher degree of care. See *Parlett* v. *Dunn,* 102 Va. 459, 46 S. E. 467, and the numerous cases cited.

What is ordinary care depends upon the facts and circumstances of the particular case. What would be ordinary cafe in one case

might be gross negligence in another. The degree of care due by the master to an infant employé of tender years is much greater than is due to an adult. *Lynchburg Cotton Mills* v. *Stanley,* 102 Va. 590, 594, 46 S. E. 908. But whatever be that degree of care, it is ordinary care under all the facts and circumstances of the case. There is language in the opinion of the court in the case last cited, standing alone, and not considered in connection with other parts of the opinion and the authorities cited, which might warrant the language used in the instruction under consideration. But that case was not intended to change the rule that ordinary care, under all the facts and circumstances of the case, was the measure of the master's duty to his servant in the case of infants as well as in the case of adults. This is apparent from the authorities quoted and relied on in that case for the conclusion reached.

Shear. & Red. on Neg. sec. 219, is quoted with approval in that case (page 594, 102 Va., and page 909, 46 S. E.), in which the law is laid down as follows: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from the risks which they cannot properly appreciate, and to which they ought not to be exposed."

Thompson on Negligence, which is also cited and quoted in that case, in section 3767 of his work, in discussing this question, says: "But in all these and in other risks the limit of his [the master's] duty and obligation is the exercise of reasonable or ordinary care."

And Bailey on Personal Injuries, who is also cited and quoted in the *Stanley Case,* declares that the measure of the master's liability to his servant is reasonable or ordinary care. Volume 1, secs. 963-966.

The instruction did not state the law correctly as to the measure of the master's duty to the servant, and the court erred in giving it.

It will be unnecessary to consider the remaining assignment of error, viz., as to the refusal of the court to set aside the verdict of the jury and grant a new trial, since the judgment will have to be reversed, the verdict set aside, and a new trial granted, for the errors heretofore pointed out.

NOTE.--In dealing with the question of the degree of care required of a master for the protection of his employés, there is no ironclad rule that can be invoked to settle with mathematical precision a particular state of facts. The courts refuse to be bound in one case by the language used in another, and

invoke the "circumstances of each particular case" and the "context" to render inapplicable some phraseology claimed to sustain a position taken. This is well illustrated by the last point in the syllabus of the principal case, in which the court modifies language used in *Lynchburg Cotton Mills* v. *Stanley*, 102 Va. 590, 596, 46 S. E. 908. In the latter case, the court, after reviewing the authorities, and stating that the defendant company employed many children under the age of fourteen years and some under the age of twelve, says: "If it is to the interest of manufacturing establishments to employ infants of such tender years, with their immature judgment and lack of experience, *not only the dictates of humanity, but public policy, demands that they should be held to the highest degree of responsibility for their care and protection.*" (Italics ours.) Relying upon this language, an instruction was given in the principal case that the law required of the master the highest degree of responsibility for the care and protection of an infant employé. The Supreme Court held that the granting of such instruction was error, in that it imposed a higher degree of care upon the defendant for the protection of the decedent than was imposed by law. Says the court: "The degree of care due by the master to an infant employé of tender years is much greater than is due to an adult. *Lynchburg Cotton Mills* v. *Stanley*, 102 Va. 590, 594, 46 S. E. 908. But whatever be that degree of care, it is ordinary care under all the facts and circumstances of the case. There is language in the opinion of the court in the case last cited, which might warrant the language used in the instruction under consideration. But that case was not intended to change the rule that ordinary care, under all the facts and circumstances of the case, was the measure of the master's duty to his servant in the case of infants as well as in the case of adults. This is apparent from the authorities quoted and relied on in that case for the conclusion reached."

While it is true that the authorities cited do state the rule as now formulated by the court, as those same authorities were examined and quoted in the Stanley case, and immediately following this examination and the quotations, the court laid down the rule embodied in the instruction, it was a fair inference that the court wanted to go a step further than the authorities, and hold the employer of infants of tender years to the highest degree of care. And this view was evidently entertained by the writer of the syllabus.

The rule as now stated by the court seems to be the one in vogue in most of states. "The subject of negligence, as applicable to children, has been discussed through the reports from various standpoints. Opinions diverge on nearly every important subdivision of the matter. The old classification of the doctrine of negligence, 'a measure with three marks on it,' is also inconvenient in handling this subject, because a different measure is needed—an instrument of more gradations and capable of more accurate adjustment to the facts of each particular case. Hence the present tendency, in at least a large class of cases, is to take ordinary care as a quantity, variable as the occasion may require, to measure the duty, 'sliding it up or down, so as to adjust it as near as may be to the reasonable requirements of the particular case.'" Note, 49 Am. St. Rep. 400.

As was said in a note, 61 Cent. L. J. 105, "The law does not afford a remedy simply because of the youth or inexperience of a party injured; each case must rest upon its own peculiar circumstances, leaving the question to the good sense of a jury, . . . the dangers having been fully pointed out, and this is a duty

devolving upon the proprietor which must not be carelessly done. The dangers are assumed by the employé notwithstanding youth or inexperience, as was held in the case of *Anderson* v. *Morrison*, 22 Minn. 274. When an employer sets an employé, who is a minor, to do dangerous work, other than that for which he was employed, the employer is not liable for the injuries simply because he set him at that work, although dangerous, unless, in view of all the circumstances, it was imprudent and negligent on the part of the employer. This rule is clearly deducible from the following cases: *Smith* v. *Erwin*, 51 N. J. Law (Vroom) 507, 18 Atl. Rep. 852, 14 Am. St. Rep. 699; *Murphy* v. *Mairs*, 6 N. Y. St. R. 42; *Hickey* v. *Taffe*, 105 N. Y. 26, 12 N. E. Rep. 286. See also Century Digest, Vol. 34. col. 827, Master and Servant, sec. 314."

It seems pertinent to remark that a prevalent fault in present day pleading is to ask too much in an instruction as well as to request too many instructions. The number of cases that are reversed on account of erroneous instructions forcibly impresses this point upon the reader of the current reports. It is very probable that if, in the principal case, an instruction had been given holding the employer to only an ordinary degree of care, as defined in the opinion, the verdict of the jury would not have been different. The fault of asking too many instructions is adverted to in *Seaboard & R. R. Co.* v. *Vaughan's Am'x*, 51 S. E. 452, published in this number of the REGISTER. In addition to the objections noted therein, there is this practical one, that the greater the number of instructions, the greater is the chance of error. See, also, 10 Va. Law Reg. 837.

C. B. G.

DUNN et al. v. STOWERS et al.

Supreme Court of Appeals of Virginia.

June 28, 1905.

[51 S. E. 366.]

1. MARRIED WOMEN—*Property rights—Contract to sell land—Enforceability.*—A contract made by a married woman for the sale of her separate estate may be enforced against her in equity.

   [Ed. Note.—For cases in point see Vol. 26, Cent. Dig. Husband and Wife, secs. 722-724; Vol. 44 Cent. Dig. Specific Performance, secs. 103, 104.]

2. SAME—*Effect of statute.*—Code 1887, sec. 2502 [Va. Code 1904, p. 1272], providing that when a husband and wife have signed a writing purporting or contracting to convey any estate, real or personal, such writing may be admitted to record, when it shall operate to convey from the wife her right of dower, and all interest which at the date of the writing she may have in the estate conveyed, but shall not operate any further upon the wife by means of any warranty contained therein which is not made with reference to her separate estate, as a source of credit, etc., does not prohibit a married woman from carrying out an executory contract for the sale of land, or prevent a court of equity from enforcing such contract against her.

   [Ed. Note.—For cases in point, see Vol. 26, Cent. Dig. Husband and Wife, secs. 722-724; Vol. 44, Cent. Dig. Specific Performance, secs. 103, 104.]